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Docket No.: KCC-14,944

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

Appellants: Christopher Peter OLSON, et al.

Serial No.: 09/855,196

Filing Date: 14 May 2001

Title: GARMENT HAVING AN APPARENT
ELASTIC BAND

Confirmation No. 8184

Customer No. 35844

Group No. 3761

Examiner: Jacqueline F. Stephens

APPEAL BRIEF UNDER 37 CFR 41.37

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, Virginia 22313-1450

Dear Sir:

Appellants herewith file this Appeal Brief in the above-identified case,
pursuant to their Notice of Appeal filed 28 February 2007.

1. REAL PARTY IN INTEREST

The real party in interest is Kimberly-Clark Worldwide, Inc., the assignee of
the present application (as recorded at reel 012625, frame 0447).

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2. RELATED APPEALS AND INTERFERENCES

Appellants are not aware of any related appeals or interferences with regard to the present application.

3. STATUS OF CLAIMS

Claims 1-4 and 6-37 are pending in the application. The present Appeal is directed to Claims 1-4 and 6-37, which were finally rejected in an Office Action, mailed 03 November 2006. These claims are contained in the Claims Appendix. Claim 5 was previously canceled.

4. STATUS OF AMENDMENTS

No amendment to the claims was filed subsequent to the most recent final rejection.

5. SUMMARY OF CLAIMED SUBJECT MATTER

This present invention as defined by independent Claim 1 includes a disposable garment 20 (Page 14, lines 22-23; FIGS. 1 and 2), comprising: a chassis 32 defining a waist opening 50 and two leg openings 52 (Page 15, lines 9-10; FIGS. 1 and 2); and an apparent elastic band 141, 143, 147, 149 (Page 24, line 14 to page 25, line 10; FIG. 2) in the vicinity of at least one of the waist and leg openings 50, 52, the apparent elastic band 141, 143, 147, 149 including a color pigment applied to a zone 104, 106 (Page 23, lines 3-5) in a targeted elastic material 100 that creates a visible perception of a discrete elastic band on the targeted elastic material 100 (Page 4, lines 6-10) where no actual elastic band is present on the targeted elastic material 100 (Page 21, lines 20-21; FIG. 2).

This present invention as defined by independent Claim 15 includes a disposable garment 20 (Page 14, lines 22-23; FIGS. 1 and 2), comprising: a chassis 32 including an absorbent composite structure 33 and side panels 34, 134 extending from the absorbent composite structure 33 (Page 15, lines 11-15; FIG. 1); waist and leg openings 50, 52 defined by the chassis 32 (Page 15, lines 9-10; FIGS. 1 and 2); and an apparent elastic band 141, 143, 147, 149 (Page 24, line 14 to page 25, line 10; FIG. 2)

in the vicinity of at least one of the waist and leg openings 50, 52, the apparent elastic band 141, 143, 147, 149 including a color pigment applied to a zone 104, 106 (Page 23, lines 3-5) in a targeted elastic material 100 that creates a visible perception of a discrete elastic band on the targeted elastic material 100 (Page 4, lines 6-10) where no actual elastic band is present on the targeted elastic material 100 (Page 21, lines 20-21; FIG. 2).

This present invention as defined by independent Claim 27 includes a disposable garment 20 (Page 14, lines 22-23; FIGS. 1 and 2), comprising: a chassis 32 defining one or more openings 50, 52 (Page 15, lines 9-10; FIGS. 1 and 2); and an apparent elastic band 141, 143, 147, 149 (Page 24, line 14 to page 25, line 10; FIG. 2) in the vicinity of at least one of the waist and leg openings 50, 52, the apparent elastic band 141, 143, 147, 149 including a color pigment applied to a zone 104, 106 (Page 23, lines 3-5) in a targeted elastic material 100 that creates a visible perception of a discrete elastic band on the targeted elastic material 100 (Page 4, lines 6-10) where no actual elastic band is present on the targeted elastic material 100 (Page 21, lines 20-21; FIG. 2).

Appellants have supplied the above claim summary in accordance with 37 CFR § 41.37(c)(1)(v).

6. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

Claims 1-4 and 6-37 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over *Mathis et al.* (U.S. Patent No. 5,680,653) in view of *Glaug et al.* (U.S. Patent No. 6,478,786).

7. ARGUMENT

CLAIMS 1-4 and 6-37 ARE NOT UNPATENTABLE OVER MATHIS ET AL. IN VIEW OF GLAUG ET AL. UNDER 35 U.S.C. § 103(a).

Appellants' claimed invention, as recited in independent Claims 1, 15, and 27, requires a *color pigment* applied to a zone in a targeted elastic material that creates a visible perception of a discrete elastic band on the targeted elastic material where ***no actual elastic band is present***. The recitation of a "targeted elastic material" (TEM)

further emphasizes the lack of actual elastic bands since, by definition, targeted elastic materials do not include materials having elasticized regions achieved through separate manufacture of an elastic band and subsequent connection of the elastic band to the underlying material.

In the Response to Arguments on page 7 of the final Office Action, the Examiner states that the definition of TEM is directed to the process. This is not true. **TEM is a material made by a process that results in a significantly different product** than an underlying material with an elastic band attached (externally). TEM is shown in FIGS. 5-9 as a targeted elastic laminate which has the elastic filaments internal to the material. This is structurally different than the elastic being on the outside of the material.

Appellants' claims include the limitation of the color pigment being applied to a zone in a targeted elastic material that creates a visible perception of a discrete elastic band on the substrate where no actual elastic band is present on the targeted elastic material. "[T]he pigment may be painted or printed onto a facing layer 120, or applied as an adhesive tape or other technique." (Page 25, lines 6-9)

The terms "targeted elastic regions" and "targeted elastic material" are defined on page 8 of the Application as follows:

The term "targeted elastic regions" refers to isolated, often relatively narrow bands or regions in a single composite material or layer, which have greater elastic tension than adjacent or surrounding regions.

The term "targeted elastic material" ("TEM") refers to a single elastic material or laminate having targeted elastic regions. TEM's include only materials or laminates which are made in a single manufacturing process, and which are capable of exhibiting targeted elastic properties **without requiring an added elastic band or layer in the targeted elastic region**. TEM's **do not include** materials having elasticized regions achieved through separate manufacture of an elastic band, and **subsequent connection of the elastic band to the underlying material**. TEM's include materials having apparent elastic bands as defined above. (Emphasis added)

As explained by Appellants at page 3, lines 3-17 of the subject Application, the elimination of a separately manufactured elastic band in garments **reduces costs**; however, because the use of visible, distinct elastic bands has gained widespread

consumer acceptance, there is an incentive to at least maintain the perception of a visibly distinct elastic band where elastic properties exist. Appellants' claimed invention, through the use of an **apparent elastic band**, creates the visible perception of a discrete elastic band, even though no such band is present. The added color pigment enhances the visible perception of a discrete elastic band, even though there is no actual elastic band.

Mathis et al., which is cited by the Examiner as the **primary obviousness reference**, fails to disclose or suggest any color pigment, particularly any color pigment that creates a visible perception of a discrete elastic band on a substrate where no actual band is present. *Mathis et al.* is silent with respect to color, pigment, print, and paint.

Mathis et al. discloses an elastic laminate suitable for use in forming a surgical gown cuff as shown in Figure 9 and discussed in Col. 8, lines 52-62. The elastic laminate includes at least one stretchable layer and at least one elastic liquid barrier layer. The elastic laminate of *Mathis et al.* is not a targeted elastic material, as explained below.

On page 4 of the 04 May 2006 non-final Office Action, the Examiner mentions that *Mathis et al.* discloses a targeted elastic material. Appellants respectfully disagree. *Mathis et al.* states: "The elastic layer 24 may further overlie all or substantially all [of] the stretchable layer 22. The elastic layer 24 may also overlie selected portions of the stretchable layer 22. In the later instance, the resulting elastic laminate may include selected areas or zones of elasticity and permeability, depending upon the elastic adhesive film forming material selected." (Col. 6, lines 26-31).

The Examiner apparently interprets the "zones of elasticity and permeability" to necessarily imply that the laminate is a targeted elastic material. However, as the definition specifies above, a "targeted elastic material" includes only materials which do not require an added external elastic band or layer in the targeted elastic region. In the *Mathis et al.* example pointed out by the Examiner an added external layer (elastic layer 24) is required to create what the Examiner terms the "high tension (elastic zones)." Therefore, this embodiment of the *Mathis et al.* laminate **is not equivalent to Appellants' targeted elastic material**. Hence, there is a **significant structural**

differentiation between Appellants' claimed garment and the garments disclosed in the *Mathis et al.* reference.

Glaug et al., which is cited by the Examiner as **the secondary obviousness reference**, discloses only distinctively colored discrete elastic fibers (Col. 5, lines 54-65), thus failing to disclose or suggest an "apparent" elastic band in which a visible perception of a discrete elastic band is created where there is no actual band.

Glaug et al. discloses protective underwear that may include at least some elastic fibers of either the front or back of the undergarment distinctively colored to be readily discernable from the color of the chassis material, thereby enabling a person to readily determine which is the front and which is the rear of the undergarment so that it can be put on properly.

The term "elastic band" is defined on pages 6-7 of the subject Application as follows:

The term "elastic band" refers to a discrete elongated element having elastic properties. The term "discrete elongated element" refers to a long, relatively narrow element that is separately manufactured and then attached to an underlying material, and does not include elongated regions having elastic properties that may be part of the underlying material as made. The terms "elastic" and "elastomeric" are used interchangeably to mean a material that is generally capable of recovering its shape after deformation when the deforming force is removed. Specifically, as used herein, elastic or elastomeric is meant to be that property of any material which upon application of a biasing force, permits that material to be stretchable to a stretched biased length which is at least about 50 percent greater than its relaxed unbiased length, and that will cause the material to recover at least 40 percent of its elongation upon release of the stretching force. A hypothetical example which would satisfy this definition of an elastomeric material would be a one (1) inch sample of a material which is elongatable to at least 1.50 inches and which, upon being elongated to 1.50 inches and released, will recover to a length of not more than 1.30 inches. Many elastic materials may be stretched by much more than 50 percent of their relaxed length, and many of these will recover to substantially their original relaxed length upon release of the stretching force.

Glaug et al. simply discloses elastic bands. The elastic bands happen to be colored in order to "color code" the garment to distinguish front from back. However, Appellants' Claims 1, 15, and 27 each recite the limitation of a *visual perception* of a

discrete elastic band where “**no actual elastic band**” is present. In *Glaug et al.*, an actual elastic band *is* present, and therefore, does not disclose an apparent elastic band.

The term “apparent elastic band” is also defined on page 7 of the subject Application. The definition states specifically that an “apparent elastic band” is **not** an elastic band. The *Glaug et al.* garment includes an elastic band, as previously stated. Thus, *Glaug et al.* also fails to disclose or suggest an ***apparent*** elastic band.

Furthermore, *Glaug et al.* does not disclose an apparent elastic band including a color pigment applied to a zone in a targeted elastic material to create a visible perception of a discrete elastic band where no actual band is present because, as previously discussed, *Glaug et al.* does not disclose targeted elastic material, and also because an actual elastic band **is present**. Therefore, the claimed structural limitation of “no actual elastic band” is not taught by *Glaug et al.*, because in *Glaug et al.* the elastic bands are real, not apparent. This distinction is akin to something that is real and tangible, as opposed to an illusion. Appellants’ claims require a visual perception, or an illusion, of a discrete elastic band without one being there, while in *Glaug et al.* there is no illusion, but rather an actual elastic band. Hence, there is a ***significant structural differentiation*** between Appellants’ claimed garment and the garments disclosed in the *Glaug et al.* reference.

The *prima facie* requirements for a case of obviousness are three-fold: 1) a suggestion or motivation to modify or combine reference teachings, 2) a reasonable expectation of success, and 3) a teaching or suggestion of all claim limitations (*see*, MPEP § 2143).

Neither *Mathis et al.* nor *Glaug et al.* identify a need or use for an apparent elastic band, thus there is no motivation to modify or combine these references, nor is there any reasonable expectation of successfully achieving Appellants’ claimed “**apparent**” elastic band, particularly an apparent elastic band enhanced with a color pigment where there is no actual elastic band. In fact, *Glaug et al.* uses actual colored elastic bands that “color code” the garment to distinguish front from back, thereby eliminating any need to create the illusion of elastic bands. Furthermore, *Glaug et al.*

fails to provide any motivation to add the illusion of an elastic band to the *Mathis et al.* laminate.

Even if *Mathis et al.* and *Glaug et al.* were combined by one of ordinary skill in the art, all of the elements of Appellants' claims would not have been disclosed or suggested. Therefore, the combination of the *Mathis et al.* and *Glaug et al.* references fails to establish any of the three requirements for a *prima facie* case of obviousness.

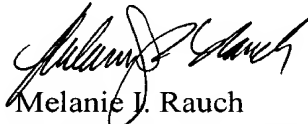
For at least these reasons presented above, Appellants respectfully request the Board to overturn this rejection.

8. CONCLUSION

For the above reasons, Appellants respectfully submit that the rejections posed by the Examiner are improper as a matter of law and fact. Accordingly, Appellants respectfully request the Board to reverse the rejection of Claims 1-4 and 4-37.

A check for the fee required by 37 CFR § 41.37(a)(2) and 37 CFR § 41.20(b)(2), updated pursuant to the Fiscal Year 2007 Fee Schedule, in the amount of \$500.00, is attached hereto. Please charge any additional amount owed or credit any overpayment, to Deposit Account 19-3550.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Melanie J. Rauch', is written over the printed name.

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CLAIMS APPENDIX

1. A disposable garment, comprising:
a chassis defining a waist opening and two leg openings; and
an apparent elastic band in the vicinity of at least one of the waist and leg openings, the apparent elastic band including a color pigment applied to a zone in a targeted elastic material that creates a visible perception of a discrete elastic band on the targeted elastic material where no actual elastic band is present on the targeted elastic material.
2. The disposable garment of Claim 1, comprising the apparent elastic band in the vicinity of the waist opening.
3. The disposable garment of Claim 1, comprising apparent elastic bands in the vicinity of both leg openings.
4. The disposable garment of Claim 1, comprising apparent elastic bands in the vicinity of the waist and leg openings.
6. The disposable garment of Claim 1, wherein the apparent elastic band comprises a high tension zone of the targeted elastic material, and a strip of extendible inelastic material over the high tension zone.
7. The disposable garment of Claim 6, wherein the extendible inelastic material comprises a spunbond web.
8. The disposable garment of Claim 7, wherein the spunbond web comprises a neck-stretched spunbond web.
9. The disposable garment of Claim 6, wherein the extendible inelastic material comprises a meltblown web.

10. The disposable garment of Claim 6, wherein the extendible inelastic material comprises a carded web selected from bonded carded webs and hydraulically entangled webs.

11. The disposable garment of Claim 6, wherein the extendible inelastic material comprises an air laid web.

12. The disposable garment of Claim 6, wherein the extendible inelastic material comprises a polymer film.

13. The disposable garment of Claim 1, wherein the apparent elastic band comprises a high tension zone of the targeted elastic material, and a band of color pigment in or over the high tension zone.

14. The disposable garment of Claim 6, wherein the strip of extendible inelastic material further comprises a color pigment.

15. A disposable absorbent garment, comprising:
a chassis including an absorbent composite structure and side panels extending from the absorbent composite structure;
waist and leg openings defined by the chassis; and
an apparent elastic band in the vicinity of at least one of the waist and leg openings, the apparent elastic band including a color pigment applied to a zone in a targeted elastic material that creates a visible perception of a discrete elastic band on the targeted elastic material where no actual elastic band is present on the targeted elastic material.

16. The disposable absorbent garment of Claim 15, comprising the apparent elastic band in the vicinity of the waist opening.

17. The disposable absorbent garment of Claim 15, comprising apparent elastic bands in the vicinity of the leg openings.

18. The disposable absorbent garment of Claim 15, comprising apparent elastic bands in the vicinity of the waist and leg openings.

19. The disposable absorbent garment of Claim 15, comprising apparent elastic bands in the side panels, further comprising at least one elastic band on the chassis substantially aligned with an apparent elastic band.

20. The disposable absorbent garment of Claim 15, wherein the side panels comprise the targeted elastic material, the targeted elastic material having high and low tension zones.

21. The disposable absorbent garment of Claim 20, wherein the targeted elastic material comprises a targeted elastic laminate.

22. The disposable absorbent garment of Claim 21, wherein the apparent elastic band comprises a high tension zone of the targeted elastic laminate, and a strip of extendible inelastic material over the high tension zone.

23. The disposable absorbent garment of Claim 22, wherein the extendible inelastic material comprises a nonwoven web.

24. The disposable absorbent garment of Claim 23, wherein the nonwoven web comprises a neck-stretched nonwoven web.

25. The disposable absorbent garment of Claim 21, wherein the apparent elastic band comprises a high tension zone of the targeted elastic laminate, and a band of color pigment in or over the high tension zone.

26. The disposable absorbent garment of Claim 22, wherein the strip of extendible inelastic material further comprises a color pigment.

27. A disposable garment, comprising:
a chassis defining one or more openings; and
an apparent elastic band in the vicinity of at least one of the openings, the apparent elastic band including a color pigment applied to a zone in a targeted elastic material that creates a visible perception of a discrete elastic band on the targeted elastic material where no actual elastic band is present on the targeted elastic material.

28. The disposable garment of Claim 27, comprising a diaper.

29. The disposable garment of Claim 27, comprising a training pant.

30. The disposable garment of Claim 27, comprising a feminine hygiene article.

31. The disposable garment of Claim 27, comprising swim wear.

32. The disposable garment of Claim 27, comprising an absorbent underpant.

33. The disposable garment of Claim 27, comprising a protective gown.

34. The disposable garment of Claim 27, comprising a protective cap.

35. The disposable garment of Claim 27, comprising a protective glove.

36. The disposable garment of Claim 27, comprising a protective drape.

37. The disposable garment of Claim 27, comprising a protective face mask.

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EVIDENCE APPENDIX

None

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RELATED PROCEEDINGS APPENDIX

None